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COMMENT

EXCLUSIONARY LAND-USE TECHNIQUES: JUDICIAL RESPONSE AND LEGISLATIVE INITIATIVE

INTRODUCTION

There are a number of recent state court cases dealing directly with local land-use regulations which discriminate against low-income groups or racial and ethnic minorities. The fourteenth amendment, the Civil Rights Acts and the Fair Housing Act are being used by courts in their efforts to infuse land-use regulations with the Constitutional guarantees of equal protection and due process of law. The decisions are invalidating practices which are promulgated for or result in discrimination; for example, refusing to grant building permits based on restrictive building codes, proposing referendums on zoning ordinances which allow low-income housing, and resegregating public housing through site selection.

Legislation designed to eliminate the exclusionary effect local land-use regulations have on low-income housing has been passed by a few states and is currently pending before the General Assembly of Illinois and the Congress of the United States.¹ This legislation, to be discussed later, is broad in its scope. In addition to bills amending the present municipal zoning codes, there are bills setting up regional coordination of land use to supersede local control. National land-use policies are being established to encourage and assist the states in regional land-use planning and development. The central purpose of this legislation is to preempt local ordinances which have, among other things, effectively excluded low-income, federally-assisted housing from the suburban areas. Through racial and economic discrimination, local regulatory ordinances have maintained segregated communities in spite of national non-discriminatory policies.

This comment will analyze local zoning ordinances and their effect on low-income minorities' need for housing in the suburbs. The analysis will show how the related devices of building codes, site selection, and public referendums supplement the zoning ordinance to frustrate at-

1. *Infra* notes 81-97.

tempts at locating low-income housing outside racially concentrated areas. Court decisions founded in due process and equal protection are calling for affirmative action by communities to include low-income housing within their borders.² State and federal legislation, through regional planning and control, are seeking to end exclusionary zoning practices and insure decent low-income housing in suburban communities. Unless communities begin to permit low-income minority housing in their area, the state and federal governments will control the land-use planning and development from a regional basis. The principle underlying this legislative and judicial action is that housing is a fundamental right guaranteed by the United States Constitution.

EXCLUSIONARY ZONING

The methods used to achieve racial discrimination have become increasingly subtle since the Civil Rights Act and the Fair Housing Act have declared racial discrimination in public housing illegal.³ Through the use of zoning ordinances, local authorities effectively exclude minority groups both racially and economically.⁴ The ironic aspect of discriminatory zoning is that comprehensive zoning as a land-use control has been

2. In *National Land and Investment Co. v. Easttown Twp. Board of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965), the Pennsylvania court, using due process as the basis for striking down an exclusionary zoning scheme, said: "The question posed is whether the township can stand in the way of the national forces which send our growing population into hitherto underdeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic or otherwise, upon the administration of public services and facilities, cannot be held valid." *Id.* at 532, 215 A.2d at 612. See *Appeal of Groff*, 274 A.2d 574 (1971) in which the court held that a municipality cannot zone out population (mobile home expansion) because of problems resulting from its increase.

The recent *Appeal of Joseph Girsh*, 437 Pa. 237, 263 A.2d 395 (1970) held a zoning ordinance unconstitutional when, though not expressly prohibiting apartments, it made no provision for them. The state court felt that no local governing unit can retreat behind a wall of exclusionary zoning whether this zoning actively excludes apartments or passively omits including them. See Washburn, *Apartments in the Suburbs: In re Appeal of Joseph Girsh*, 74 DICK. L. REV. 634 (1970); Note, 24 S.W.L.J. 838 (1970).

3. See 42 U.S.C. §§ 1983, 2000d (1970); 42 U.S.C. §§ 1441(a), 3601 (1970).

4. See Friedman, *Public Housing and the Poor: An Overview*, 54 CALIF. L. REV. 642 (1966); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Comment, *Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 SO. CALIF. L. REV. 335 (1972); Comment, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971); Note, *Low-Income Housing in the Suburbs: The Problem of Exclusionary Zoning*, 24 U. FLA. L. REV. 58 (1971).

held constitutional by the courts since 1926.⁵

A recent situation typified the problems low-income families have obtaining public housing in the suburban area.⁶ Black Jack, Missouri, is a small, unincorporated community about 15 miles south of St. Louis. Ranch and split-level homes make up the residences and are \$30,000 to \$35,000 in value. A St. Louis based social action group, called the Inter-religious Center for Urban Affairs, Inc., purchased 11.9 acres of land in 1969 for construction of low-income housing units in the Black Jack community. The development was to be financed through FHA-insured loans and known as Park View Heights. Local county and town citizens opposed the development in fear of over-crowded schools and anxiety about increases in the crime rate. The Black Jack Improvement Association was formed to warn the citizens of the imminent dangers and Black Jack was incorporated. Soon thereafter, the local zoning ordinance was revised. Local land, formerly zoned for multiple dwellings, was rezoned to permit only single-family dwellings. The Center's housing director said, "All the questions were tainted by racial considerations."⁷ George Romney of the Department of Housing and Urban Development (HUD) called the zoning ordinance a "blatant violation of the Constitution and the law."⁸

Zoning, by definition, means to exclude certain uses of land⁹ for the public health, safety, morals, and general welfare.¹⁰ The power to zone

5. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). See also Johnson, *Constitutional Law and Community Planning*, 20 LAW AND CONTEMP. PROB. 199 (1955), dealing with the Supreme Court's refusal to hear zoning cases. Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896 (1970). See generally, R. ANDERSON, *AMERICAN LAW OF ZONING* / 2.10 (1968); J. MATZENBAUM, *THE LAW OF ZONING* (2nd ed. 1955).

E. BASSETT, *ZONING* § 133 (1940) includes a discussion of the first comprehensive zoning ordinance and the case upholding its validity, *Lincoln Trust Co. v. Williams Bldg. Corp.*, 299 N.Y. 313, 128 N.E. 209 (1920), which upholds comprehensive zoning in New York and was the basis for later enabling acts.

6. *Fixing the Odds in Black Jack*, TIME, April 26, 1971, at 19. See Comment, *Exclusionary Zoning and the Problem in Black Jack—A Denial of Housing to Whom?* 16 ST. LOUIS U.L.J. 294 (1971) discussion of Park View Heights Corp. v. Black Jack, 335 F. Supp. 899 (1971).

7. TIME, April 26, 1971, at 19.

8. *Id.* at 20.

9. See Siegan, *Exclusion Is the Name of the Game*, Chicago Tribune, July 11, 1971, at 3, sec. 1a, col. 1. For cases upholding the power to divide a city into specific areas for desegregated uses, see *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479 (1925); *Mansfield and Sweet, Inc. v. West Orange*, 120 N.J.L. 145, 198 A. 225 (1938); *Cleaver v. Board of Adjustment*, 414 Pa. 367, 200 A.2d 408 (1964).

10. See *Kirsh Holding Co. v. Borough of Manasquan*, 111 N.J. Super. 359, 268

is not absolute, but must be exercised, subject to the specific state enabling statutes and the state and federal constitutions, in a non-discriminatory manner.¹¹ The likelihood of zoning ordinances being used in such a manner was discarded by Judge Westenhaver 47 years ago when he said:

The plain truth is that the true object of the [zoning] ordinance in question is to place all the property . . . in a straitjacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack . . . is primarily economic.¹²

An interesting characteristic of exclusionary zoning ordinances is their subtlety. On their face they seem reasonable enough, but a closer examination will reveal the insidious scheme to prevent low-income housing from entering the community, restrict the area to a specific income level, and deny a growing population a place to live and work.

The zoning ordinance effectuates discrimination in a variety of ways.¹³ Lot size requirements can raise the cost of land and make it impossible for even a moderate-income family to live in the area.¹⁴ Restrictions as

A.2d 333 (1970); *Mid-West Emery Freight System, Inc. v. City of Chicago*, 120 Ill. App. 2d 425, 257 N.E.2d 127 (1970); *New York Institute of Technology, Inc. v. Ruchgaber*, 317 N.Y.S.2d 89, 65 Misc. 2d 241 (1970).

11. See *Buchanan v. Warley*, 245 U.S. 60 (1970); *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908 (N.D. Cal. 1970); *High Meadows Park, Inc. v. City of Aurora*, 112 Ill. App. 2d 220, 250 N.E.2d 517 (1969); *City of Phoenix v. Burke*, 9 Ariz. App. 395, 452 P.2d 722 (1969); *Decker v. Coleman*, 6 N.C. App. 102, 169 S.E.2d 487 (1969).

12. *Village of Euclid v. Ambler Realty Co.*, 297 F. 307, 316 (1924), *rev'd* in 272 U.S. 365 (1926). The isolation and resulting "ghettoization" of minority groups tend to multiply the discriminatory practices perpetuated on them. Second-rate municipal services, loss of voting power through gerrymandering, selective police practices, corrupt merchants and inferior education are a few examples of the effects of segregation. See Dubofsky, *Fair Housing: Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 165 (1969); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969). For a recent state court decision invalidating the method of financing the public schools due to invidious discrimination, see *Serrano v. Priest*, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971), *infra* note 61. See also Peiler, *Metropolitanization and Land-Use Parochialism—Toward a Judicial Attitude*, 69 MICH. L. REV. 655 (1971).

13. AMERICAN SOCIETY OF PLANNING OFFICIALS, RESEARCH REPORTS NOS. 2 AND 6 prepared for the NATIONAL COMMISSION ON URBAN PROBLEMS, PROBLEMS IN ZONING AND LAND-USE REGULATION (1968).

14. See NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY; H.R. DOC. 91-34, 91st Cong., 1st Sess. 211 (1968). A lot size requirement of two acres has been held unconstitutional for being exclusionary in *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970). Communities must deal with the problems of population growth and cannot refuse to confront future development by adopting zoning regulations that effectively restrict population to

to the type of residence to be placed on the lot will thwart construction of low-income apartment buildings.¹⁵ Prohibition against industry is another device used to discourage low-income housing, for there are no jobs for low-income or minority groups where industry is absent.¹⁶ Can local zoning ordinances which exclude federally assisted housing be justified as substantially related to public health, safety, morals and welfare in view of the need for low-income housing?

If anything, local exclusionary zoning has an adverse effect on minority groups by confining them to the congested urban areas. *Shannon v. U.S. Department of Housing and Urban Development*¹⁷ recognized the congressional view as to the factors which caused urban blight and the possible solutions. Among the considerations relevant to a proper determination of low-income housing sites by HUD was the following:

Have the zoning and other land-use regulations of the local governing body in a geographic area . . . had the effect of confining low-income housing to certain areas, and, if so, how has this affected racial concentration?¹⁸

The court required HUD to act affirmatively to achieve fair housing because "increase or maintenance of racial concentration is *prima facie* likely to lead to urban blight and is thus *prima facie* at variance with the national housing policy."¹⁹

near present levels. "We fully realize that the overall solution to these problems lies with greater regional planning." *Id.* at 769. See also *Kennedy Park Homes Assoc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970); *National Land and Investment Co. v. Easttown Twp. Board of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965). Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953).

15. See Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953). See also *Molino v. Mayor and Council of Borough of Glassboro*, 116 N.J. Super. 195, 281 A.2d 401 (1971) in which the zoning ordinance required such amenities as automatic garbage disposals, central air conditioning, pools and tennis courts. The ordinance was held to be violative of the equal protection clause of the fourteenth amendment and an invalid use of the zoning power to restrict the city's population to adults in an effort to avoid increased tax burdens. *Accord*, *DeSimone v. Greater Englewood Housing Corporation* No. 1, 56 N.J. 428, 267 A.2d 31 (1970).

16. NATIONAL COMMISSION ON URBAN PROBLEMS, *supra* note 14.

17. *Shannon v. U.S. Department of Housing and Urban Development*, 436 F.2d 809 (3d Cir. 1970).

18. *Id.* at 822. See Cunningham, *Land-Use Control—The State and Local Programs*, 50 IOWA L. REV. 367 (1965) for statistical analysis of where most people live and how fragmented local zoning is.

19. *Shannon v. U.S. Dep't of Housing and Urban Developments*, 436 F.2d 809, 821 (1970). See Note, 46 R.Y.U.L.R. 560 (1971). For discussion of racial concentration through site selection, see *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969), *infra* note 30, *et seq.*

Discriminatory zoning practices need to be recognized and eliminated along with other land-use regulations which result in racial and economic discrimination. Three such land-use devices—building codes, site selection, and public referendum—have surfaced in recent cases. The next sections will focus on each, revealing its effect on low-income housing and the judiciary's response. The decisions will illustrate the need for state and federal legislation authorizing regional land-use planning to supersede local land-use regulations which affect public housing.

BUILDING PERMITS

Coupling zoning ordinances with restrictive and archaic building codes barricades a community from undesired construction and unwanted people. Obsolete and excessively restrictive building codes grounded in terms of health, safety and general welfare prevent the use of such modern technology as off-site production and standardized design in the construction of buildings.²⁰ Building codes and zoning ordinances are supposedly implemented to insure health and safety, control the burden on municipal services, and promote the optimal use of the land. In many cases, they reduce the supply of low-income families. The result is socio-economic segregation paralleling racial discrimination.²¹

In areas where the land is zoned to include multiple dwellings so as to allow the possibility of low-income housing, any attempt to construct federally-assisted housing can be frustrated by a denial of a building permit. In *Crow v. Brown*,²² two unincorporated tracts of land were zoned to per-

20. See Williams, *Planning Law and Democratic Living*, 20 LAW AND CONTEMP. PROB. 317 (1955). See also REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIC DISORDERS (1968) which said, "We can no longer afford the waste caused by arbitrary and archaic building codes." *Id.* at 263.

21. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969). A statute which is constitutional on its face may, in the context of a given factual situation, be applied unfairly or for a discriminatory purpose. Statutes such as this have long been held as violative of the equal protection clause of the fourteenth amendment. See *United States v. Louisiana*, 380 U.S. 145 (1965); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *United States v. Scotland Neck City Board of Education*, 442 F.2d 575 (5th Cir. 1971); *Wright v. City of Brighton*, 441 F.2d 447 (9th Cir. 1971).

22. *Crow v. Brown*, 332 F. Supp. 382 (N.D. Geo. 1971), *aff'd* 457 F.2d 788 (5th Cir. 1972). See Comment, *Suburban Zoning Ordinances and Building Codes: Their Effect*, 45 NOTRE DAME LAWYER 123 (1969).

The court in *Crow* found, with respect to public housing, a locality can no more concentrate low-income blacks in ghetto areas than they can confine black children to segregated schools. Discrimination in housing and education is both racial and economic. The same solutions can be used in each. See *Serrano v.*

mit construction of apartments based on the prior owner's intention to build "nice" apartments, townhouses, and a shopping center. After purchase of the land, the plaintiff complied with all building codes and planning requirements, but intended to participate in a "turnkey" project²³ wherein completed apartments are sold to the local housing authority and then leased to qualified low-income tenants. County officials denied the requisite building permits despite approval from the Atlanta Housing Authority, HUD and favorable zoning. Plaintiff claimed that the denial of a building permit was based on racial reasons because the county officials did not consider low-income apartments "nice." The court ruled that the failure to issue the permit was a denial of equal protection under the fourteenth amendment, a violation of the Civil Rights Acts of 1964 and 1968 and a thwarting of the national policy of dispersed public housing.²⁴ Moreover, any activity or lack thereof tending to concentrate low-income blacks was held to be invalid.²⁵ Admonishing the county officials, the court said that "[h]aving already zoned these sites for apartments, it should be obvious that the County may not restrict the class of Americans to be housed therein."²⁶ The building permit was not allowed to prevent construction of low-income housing in an area zoned for apartments.

The decision in *Crow* applies only to land that is already favorably zoned for apartments, thus limiting its application in situations involving unincorporated or restrictively zoned land. In *Dailey v. City of Lawton, Oklahoma*,²⁷ plaintiff applied for a zoning "change"; as amended, plaintiff would be able to acquire a building permit which would allow construction of low-income housing. Most of the land surrounding the proposed location was zoned for high-density apartment use. Both the zoning petition and building permit were denied after the townspeople circulated a petition which opposed the change. The court allowed mandatory injunctive relief under the Civil Rights Act²⁸ holding that the denial was racially

Priest, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971) and *Brown v. Board of Education*, 347 U.S. 483 (1954).

23. For a good explanation of how turnkey projects are set up, see Comment *Turn Key Public Housing in Wisconsin*, 1969 WIS. L. REV. 231.

24. See 42 U.S.C. §§ 801, 1983, 3601 (1970). See also Comment, *The Equal Protection Clause: A Single-edged Sword for the Gordian Knot of Exclusionary Zoning*, 40 U.M.K.C.L. REV. 24 (1971).

25. For cases on the affirmative duty of officials to end racial segregation, see text accompanying *supra* note 17 and *infra* note 50.

26. *Crow v. Brown*, 332 F. Supp. 382, 390 (1971).

27. *Dailey v. City of Lawton, Oklahoma*, 296 F. Supp. 266 (W.D. Okla. 1969), *aff'd* 425 F.2d 1037 (10th Cir. 1970).

28. 42 U.S.C. § 1983 (1970). This section provides that: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or

motivated, arbitrary and unreasonable. Moreover, if local officials are effectuating a discriminatory design of private individuals, there need be no proof of any open discriminatory statements by the officials themselves.²⁹ *Crow* and *Dailey* involved blatant discriminatory uses of building codes. More often, building codes operate indirectly to achieve exclusionary results.

SITE SELECTION

Once some land-use regulations were revealed as potential instruments to be used to segregate and isolate people according to income levels or skin color, all land-use regulations and techniques came under scrutiny. The United States Constitution denounces racial segregation; any conduct by local officials which is little more than an excuse to avoid integration is no longer permitted.

In *Hicks v. Weaver*,³⁰ a preliminary injunction was issued against a housing authority to prevent construction of public housing in an all black area. HUD was enjoined³¹ from funding the project as the city's policy was to maintain racial segregation through site selection. Although not a per se violation of the Civil Rights Act, locating public housing in all black areas was held to create a strong inference of discrimination. The court put the burden on the city to show that no alternative sites were available. If the dominant purpose of placing low-income housing in all black areas is to maintain racial concentration and segregation, then there is a violation of the equal protection clause of the fourteenth amendment and the Civil Rights Act of 1964.³² The city has a duty not to discriminate in its selection of sites. However, is the duty imposed merely the negative one not to discriminate intentionally or is the duty a positive mandate that requires affirmative action to prevent discriminatory results?

territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

29. See *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Shelley v. Kraemer*, 334 U.S. 1 (1948). These two Supreme Court cases hold that a state cannot enforce a provision which permits private individuals to discriminate.

30. *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969).

31. 42 U.S.C. § 2000d (1970). This section states: "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

32. See LOW-RENT HOUSING MANUAL § 205.1 (1967) in which HUD inter-

An Arizona court³³ answered this problem in a case where the plaintiffs contended that placement of a "turnkey" project in a predominantly black area violated their constitutional rights. Where the result would be perpetuation of isolation of racial and national groups, the Tucson Housing Authority was held to have abused its discretion and was enjoined. The court based its decision on three major criteria: (1) that the area selected is the only black area in the community; (2) that the Authority admittedly rejected considering the racial character of the neighborhood;³⁴ and (3) that there is no evidence that any such project has been placed in a white area. The court said:

The duty imposed under the statute and the regulations is not simply the negative duty to not discriminate. It is a mandate that prohibits housing authorities from acting in a manner that results in discrimination.³⁵

By reading the fourteenth amendment of the Constitution together with federal laws, the court arrived at the conclusion that racial discrimination in site selection "has become of sufficient import to warrant its specific prohibition by regulation."³⁶

The courts, so far, are dealing successfully, and consistently with exclusionary zoning practices, building codes, and site selection. The judiciary is concluding that local control is not synonymous with local autonomy. With each community legislating in its own provincial interests, the metropolitan area becomes a checkerboard of conflicting land-use regulations permitting beneficial uses and excluding undesirable ones. The courts are attempting to require that each community share the burden of uneconomic uses and provide low-income housing for minority

preted the Civil Rights Act as forbidding federally-financed housing in all black areas unless there is no other site available.

For the national policy of balanced and dispersed public housing, see *Kennedy Park Homes Ass'n v. City of Lackawanna*, 318 F. Supp. 669 (W.D.N.Y. 1970), *aff'd* 436 F.2d 108 (2d Cir. 1970), *cert. denied* 401 U.S. 1010 (1971); *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969), enforced in 304 F. Supp. 736 (1970), *aff'd* 436 F.2d 306 (7th Cir. 1970), *cert. denied* 402 U.S. 922 (1971); *Dailey v. City of Lawton, Oklahoma*, 296 F. Supp. 266 (W.D. Okla. 1969), *aff'd* 425 F.2d 1037 (10th Cir. 1970); *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969). See also NATIONAL COMMISSION ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY*, H.R. Doc. No. 91-34, 91st Cong. 1st Sess. 5 (1969); Comment, *Exclusionary Zoning: Damage Actions Under the Civil Rights Act*, 1971 L. AND SOCIAL ORDER 538 (1971).

33. *El Cortez Residents and Property Owner's Ass'n v. Tucson Housing Authority*, 10 Ariz. App. 132, 457 P.2d 294 (1969). For a discussion of discrimination in site selection, see Note, 64 MICH. L. REV. 871 (1966); Note, 64 N.W. L. REV. 720 (1970); Note, 23 STAN. L. REV. 63 (1970); Note, 1970 WISC. L. REV. 559.

34. The criteria used by the authority included availability of transportation, local zoning, community services, traffic patterns and business locations.

and low-income groups. However, there is confusion and disagreement as to the approach the judiciary should take toward public referendums on land-use policy.

REFERENDUMS

Due to the public policy of non-discrimination, the need for low-income housing, the judiciary's current approach to exclusionary land-use devices and a growing awareness of the problems of poverty, ordinances are being drafted to include low-income housing. In a reaction to this legislation, the public referendum is a tool the community can use to set the pure democratic process of direct legislation to the task of invalidating any laws directed at achieving dispersed, non-discriminatory, low-income housing.³⁷

35. *El Cortez Residents and Property Owner's Ass'n v. Tucson Housing Authority*, 10 Ariz. App. 132, 134, 457 P.2d 294, 296 (1969). Affirmative action on the part of public officials has been expanded to include omission. See *Norwalk Core v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968) where the court said: "Equal protection of the laws means more than merely the absence of governmental action designed to discriminate . . . 'we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair . . . as the perversity of a willful scheme.'" *Id.* at 931. See also the dissent in *English v. Town of Huntington*, 448 F.2d 319, 324 (2d Cir. 1971) where Judge Oakes states: "[P]laintiffs made a significant preliminary showing of the town's long-standing policy of passivity resulting in housing discrimination against minority groups, to have justified a grant of some form of preliminary relief . . ." *Id.* at 326.

36. *El Cortez Residents and Property Owner's Ass'n v. Tucson Housing Authority*, 10 Ariz. App. 132, 134, 457 P.2d 294, 296 (1969). The federal actions which supported the state court's decisions are: Executive Order No. 11063 (1962) which is a directive requiring non-discriminatory federal housing; Civil Rights Act, 42 U.S.C. § 2000d (1970); 24 C.F.R. § 1.4(2)(i) (1969) which reads that "[A] recipient (state or political subdivision), in determining the location or type of housing . . . may not directly or through contractual or other agreements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity as respect persons of a particular race, color, or national origin."

37. In *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969) zoning allowed low-rent apartment construction. The community circulated a referendum petition to deny zoning through a general election. The court could find no federal law to support an injunction against the referendum. The referendum was deemed to be founded on neutral principals, not discrimination. The referendum being a legislative process of the state is held to be exempt from federal constitutional restraints. "[I]f the electors had a legal right to a referendum, their motive in exercising that right would be immaterial." *Id.* at 326. Compare with *Reitman v. Mulkey*, 387 U.S. 369 in which the Court ruled on the referendum after the election and then held that it did more than repeal existing law. The referendum authorized discrimination in the housing market.

But see *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409 (1968). The Court held 42 U.S.C. § 1982 (1970) not only applies to government housing policies but af-

Before dealing directly with zoning referendums, the constitutional case, *Shelley v. Kramer*,³⁸ can provide the necessary background to understand the complexity of the issues present when a public referendum overrides a local zoning ordinance that permits low-income housing. Generally, the issue presented in *Shelley* was whether the state courts can enforce private restrictive covenants placed on land whose purpose was the exclusion of minority groups from the ownership or occupancy of that real property. It was decided that judicial enforcement of these private agreements would deny certain minority groups equal protection of the law. The private agreements themselves were not violative of the fourteenth amendment. However, active intervention by the state courts to enforce these private agreements would be unconstitutional state action under the equal protection clause of the fourteenth amendment.³⁹ The state was not merely abstaining from action, leaving private individuals free to discriminate. The state was actively denying property rights on the grounds of race or color. The court declared the restrictive covenants unenforceable.⁴⁰

More recently, petitioners in *Reitman v. Mulkey*⁴¹ were suing under state statutes which prohibited discrimination⁴² as they felt they were denied the right to purchase housing on the basis of race. However, through an initiated measure submitted to the public as Proposition 14, a section was successfully added to the state constitution which provided that the state would not deny or limit the right of any person to decline

fects private refusals to sell real property on discriminatory grounds. It was determined that: "[W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery." *Id.* at 442-43. *Accord*, *Hurd v. Hodger*, 334 U.S. 24 (1948).

38. 334 U.S. 1 (1948). For the historical evolution from restrictive covenants to zone ordinances, see R. ANDERSON, *AMERICAN LAW OF ZONING* § 2.04 (1968); BURBY, *REAL PROPERTY* 141 (1954).

39. The first section of the fourteenth amendment to the Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See the Civil Rights Act of 1866 which requires that: "All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

40. *Shelley v. Kraemer*, 334 U.S. 1, at 18-23 (1948).

41. *Reitman v. Mulkey*, 387 U.S. 369 (1967). See Karst and Horowitz, *Reitman v. Mulkey: A Telephase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39.

42. CAL. CIV. CODE §§ 51, 52 (1972).

to sell real property to persons as he, in his absolute discretion, chooses.⁴³ The California Supreme Court was convinced that this state constitutional provision overturned the state laws dealing with discrimination in housing. The question before the United States Supreme Court was whether the state is taking a neutral position on private discrimination by the presence of this amendment in their constitution. The Court assessed that the ultimate impact of the provision "would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment."⁴⁴ In declaring the initiated provision of the people unconstitutional, Justice White, speaking for the majority, made clear that:

[A] court [must] assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations. Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discrimination. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market.⁴⁵

Justice Douglas, in a concurring opinion, compares Proposition 14 to the restrictive covenant in *Shelley* as "only another device of the same character."⁴⁶

However, in *Southern Alameda Spanish Speaking Organization v. City of Union City, California*⁴⁷ (SASSO), plaintiffs sought an injunctive action directing the city to follow the zoning changes permitting construction of federally-financed housing for low-income and moderate-income families in spite of a city-wide referendum overruling the rezoning ordinance. The court felt racial motives were no more evident than environmental ones and would not discuss the result of the referendum. By orienting itself to the motives rather than the results of the referendum, the court expounded:

43. CAL. CONST. Art. 1, § 26 (1969).

44. *Reitman v. Mulkey*, 387 U.S. 369 at 376 (1967). For other decisions which invalidated state action in either authorizing or encouraging discrimination, see *infra* note 45.

45. *Reitman v. Mulkey*, 387 U.S. 369, 380-81 (1967). For cases where significant state involvement in private discrimination amounts to unconstitutional state action, see *Robinson v. Florida*, 378 U.S. 153 (1964); *Anderson v. Martin*, 375 U.S. 399 (1964); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Nixon v. Conlon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1926); *McCabe v. Atchison, Topeka and Santa Fe R. Co.*, 235 U.S. 351 (1914).

46. *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967). Justices Harlan, Black, Clark and Stewart joined in a lengthy dissent.

47. *Southern Alameda Spanish Speaking Organization v. City of Union City, California*, 424 F.2d 291 (9th Cir. 1970).

A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to over-ride the views of their elected representatives as to what serves the public interest.⁴⁸

The fact that discrimination may have been the effect of the referendum and that the city had failed to provide low-income housing was not enough to require an injunction for affirmative action by the city. The court was, however, aware of the relationship between the referendum and a possible exclusionary zoning impact when it said that if "the result of this zoning by referendum is discriminatory (in denying decent housing for low-income residents) . . . a substantial constitutional question is presented."⁴⁹ The court, however, did not reach this constitutional issue.

In *Hunter v. Erickson*,⁵⁰ a city had adopted a fair housing ordinance. Thereafter, the city charter was amended by popular vote. The new amendment provided that any ordinance regulating real property transactions on the basis of race, color, or national origin had to be subjected to a public referendum. This mandatory referendum was found to place a "special burden"⁵¹ on racial minorities in their efforts to use the governing process to protect their rights. Justice White, again speaking for the majority, rejected the appeal to allow the townspeople to participate in decisions in order that, in the area of race relations, the city move slowly by saying:

[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.⁵²

Both *Reitman* and *Hunter* invalidated state action which led to encouragement or enforcement of provisions that had the purpose or effect of denying equal protection under the law. Referendums can not be used to involve the state in discrimination by either overturning or adding special requirements to existing laws. The Court has not, however, been totally consistent in its examination of referendums.

48. *Id.* at 294. See *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969).

49. *Id.* at 295. The court recognized the affirmative responsibility by the city to include the needs of the poor. The court said: "[I]t may well be, as a matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low-income families, who usually—if not always—are members of minority groups." *Id.* at 295-96.

50. *Hunter v. Erickson*, 393 U.S. 385 (1969).

51. See *Anderson v. Martin*, 375 U.S. 399 (1964).

52. *Hunter v. Erickson*, 393 U.S. 385, 393 (1969). Justices Harlan and Stewart concurred with the decision while Justice Black dissented.

*James v. Valtierra*⁵³ is a case with similar facts to *Hunter*, but with a different conclusion. The state adopted California Constitution Article XXXIV which required a mandatory referendum by any community before low-rent housing could be built. The referendum specifically applied to any low-rent housing rather than referring exclusively to a racial minority as in *Hunter*. The article was challenged on equal protection grounds, but the court refused to extend *Hunter*, which voided a provision referring to race, color, and natural origin, to include the provision in *James* which referred only to low-rent housing. This difference led the court to view the referendum as a "devotion to democracy, not to bias, discrimination, or prejudice."⁵⁴

A fact the court ignored was that blacks occupy a majority of low-income housing units.⁵⁵ By upholding an article to a state constitution which defines not only low-income housing, but low-income people, the Court has validated economic discrimination. Classification on the basis of poverty has long been a suspect classification and such laws normally require exacting judicial scrutiny.⁵⁶ Just below the surface of the *James* referendum lurked economic discrimination denying a specific class of people a decent home in a decent area. Justice Marshall, joined by Justices Brennan and Blackmun, dissented in *James* declaring:

It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class or citizen tramples the values that the Fourteenth Amendment was designed to protect.⁵⁷

53. *James v. Valtierra*, 402 U.S. 137 (1971). See Lafcoe, *The Public Housing Referendum Case, Zoning and the Supreme Court*, 59 CALIF. L. REV. 1384 (1971).

54. *James v. Valtierra*, 402 U.S. 137, 141 (1971).

55. See generally NATIONAL COMMISSION ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* (1968); PRESIDENT'S COMMITTEE ON URBAN HOUSING: *A DECENT HOME* (1968); REPORT OF NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

56. See *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970); *McDonald v. Bd. of Election*, 394 U.S. 802 (1969); *Roberts v. LaVallee*, 389 U.S. 40 (1967); *Anders v. California*, 386 U.S. 738 (1967); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Douglas v. California*, 372 U.S. 353 (1963). See also Hagman, *Urban Planning and Development—Race and Poverty—Past, Present and Future*, 1971 UTAH L. REV. 46; Michaelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 19-23 (1969).

57. *James v. Valtierra*, 402 U.S. 137, 145 (1971). For a discussion of land-use regulation and the way they discriminate economically, see Cutler, *Legality of Zoning to Exclude the Poor: A Preliminary Analysis of Evolving Law*, 37 BROOKLYN L. REV. 483 (1971); Note, 56 CORNELL L. REV. 343 (1971); Note, 16 HOW. L.J. 351 (1971); Note, 23 STAN. L. REV. 774 (1971); Note, 15 SYRACUSE L. REV. 507 (1964); Note, 81 YALE L.J. 61 (1971).

James is a step in the wrong direction in dealing with referendums overturning the fair housing ordinances and in recognizing the depressing effect economic discrimination has on poor people. It has been suggested that *James* be narrowly construed.⁵⁸

ECONOMIC DISCRIMINATION

At this point in American judicial history, it would not be presumptuous to say that the right to decent housing should be a fundamental right and should not be a function of wealth. There are numerous Supreme Court decisions which correct economic discrimination in areas other than housing. The Court has used the equal protection clause to strike down a poll tax due to its discriminatory effect on a poor person's right to vote;⁵⁹ to require a state to provide free transcripts for appellate review in felony cases when the defendants are indigent;⁶⁰ to strike down a state-wide system for financing public schools by local property taxes as an invidious discrimination against the poor.⁶¹

Although the factual backgrounds in these cases are diverse, there is a common goal being achieved—extension of the fourteenth amendment's protection to the poor. These cases are at least analogous to exclusionary land-use regulation cases and at most offer the convincing rationale for legislation to end exclusionary land-use regulation.⁶²

58. In *English v. Town of Huntington*, 448 F.2d 319 (2d Cir. 1971), Judge Oakes in his dissent would prefer to read *James* more narrowly as approving a state-wide referendum requirement for investment in low-rent public housing in a state where other referenda are used on a variety of subjects . . . *Id.* at 327, fn. 5. See Williams and Wachs, *Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited*, 1969 WIS. L. REV. 827 discussing Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *app. denied*, 344 U.S. 919 (1953).

59. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

60. *Griffin v. Illinois*, 351 U.S. 12 (1956). This right was recently expanded to include misdemeanors in *Mayer v. City of Chicago*, 404 U.S. 189 (1971).

61. *Serrano v. Priest*, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971). The court said ". . . the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth. . . ." *Id.* at 1244. See *San Francisco Unified School Dist. v. Johnson*, 3 Cal. 3d 937, 92 Cal. Rptr. 309, 479 P.2d 669 (1971).

62. Another fundamental right which could be used by analogy to declare exclusionary land-use devices illegal is the right to travel. The Court knocked down the state one year residency requirement for receipt of welfare assistance and stated in *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969): "An indigent who desires to migrate, resettle, find a new job, start a new life will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute. But the purpose of inhibiting migration by needy persons into the state is constitutionally impermissible." (emphasis added). See *United States v.*

PRE-EMPTION

There is ample rationale available to support the proposition that local governmental units' control over land-use regulation affecting low-income housing should be superseded by state and federal legislation to provide federally-assisted public housing in all communities.⁶³ The cases discussed in this comment point out the discriminatory practices designed to maintain racial and economic segregation and isolation. The case-by-case approach to combat local control devices is at best piece-meal and at worst a failure. A more direct approach, and one being used in some states and considered by others, is the use of the power of preemption.

Preemption by a state of a municipality's power is not a novel or new concept.⁶⁴ In an area such as zoning, municipalities generally receive their power to zone from a state enabling act.⁶⁵ Basically, the theory is "what the state giveth, the state taketh away." When the state and municipality are both legislating in the same field inconsistencies overlap and conflicts will arise. The state law is supreme and it is a settled doctrine that:

[T]he enactment by the state of legislation constituting a comprehensive and detailed general plan or scheme with respect to a subject shows, without more, an intent to occupy the field, leaving no room for local regulation, regardless of whether there is an express declaration to that effect by the Legislature.⁶⁶

Guest, 383 U.S. 745 (1966) (Land-use regulation which excludes low-income families from an area also inhibits interstate movement); *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409 (1968) (right to buy, sell and lease real property in any state); *Edwards v. California*, 314 U.S. 160 (1941) (right not to be excluded from any state); *Corfield v. Coryell*, 4 Wash. D.C. (3d Cir. 1823) (right to establish residency in any state). See also Ellis, Shapiro, Dandridge, and *Residency Requirements in Public Housing*, 1972 URBAN L. ANN. 131.

63. For a good discussion on local government's potential to thwart the appropriate distribution of governmental power to achieve or protect basic community values within the state, see Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964).

64. See generally R. ANDERSON, *AMERICAN LAW OF ZONING* §§ 3.01-3.07 (1968); S. SATO AND A. ALSTYNE, *STATE AND LOCAL GOVERNMENT LAWS* (1970). See also 1 J. DILLON, *MUNICIPAL CORPORATIONS* § 99 (1911); FORDHAM, *LOCAL GOVERNMENT LAW* § 43 (1949); 2 E. MCQUILLIN, *MUNICIPAL CORPORATIONS* § 10.11 (1965).

65. See Comment, *Governmental Immunity from Local Zoning*, 84 HARV. L. REV. 869 (1971); Comment, *The Applicability of Zoning Ordinances to Governmental Land-Use*, 39 TEX. L. REV. 316 (1961); Comment, *The Inapplicability of Municipal Zoning Ordinances to Governmental Land-Uses*, 19 SYRACUSE L. REV. 698 (1968); Comment, *Conflicts Between State and Local Enactments*, 2 URBAN LAWS 398 (1970).

66. *In re Carol Lane*, 58 Cal. 2d 99, 22 Cal. Rptr. 857, 372 P.2d 897 (1962). See ILL. CONST. art. 7, § 36(h). "[T]he General Assembly may provide spe-

The federal government has also refused to be hamstrung by a state or local community's refusal to zone for a desired use or to permit a federal project. In *City of Tacoma v. Taxpayers of Tacoma*,⁶⁷ the city had a license from the Federal Power Commission authorizing the construction of dams. The state legislature had enacted a law to protect the fish life and prevent the type of construction contemplated under the federal license. The people in the area and throughout the state promoted Initiative No. 25 which prohibited the proposed construction, even if under a federal license. The state court, in review of the Supreme Court's decision on the same facts,⁶⁸ held that state law can neither prevent the Federal Power Commission from issuing the license nor bar the city from acting under the license. The court explained:

The United States has exclusive and paramount jurisdiction over navigable waters under the commerce clause of the United States Constitution, and, therefore, any State laws are inapplicable . . . insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of the appellants' license for said project, or which would enable the State . . . or any State official thereof to exercise a veto over said project. . . .⁶⁹

The rationale is that Congress has the Constitutional power to enact the Federal Power Act and having enacted it, intended the Federal Power Commission to supersede state laws purporting to prohibit or limit the purpose of the Act. The Supremacy Clause has displaced the state law in that area.⁷⁰

It is entirely possible that federal law in the form of civil rights and fair housing acts has already pre-empted state law in the field of placement of public low-income housing.⁷¹ Local exclusionary land-use regu-

cifically by law for the exclusive exercise by the State of any power or function of a home rule unit. . . ."

67. *City of Tacoma v. Taxpayers of Tacoma*, 60 Wash. 2d 66, 371 P.2d 938 (1962).

68. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958).

69. *City of Tacoma v. Taxpayers of Tacoma*, 60 Wash. 2d 66, 371 P.2d 938 (1962).

70. See *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Free v. Bland*, 369 U.S. 663 (1962); *Campbell v. Hussey*, 368 U.S. 297 (1961). See also *Perez v. Campbell*, 402 U.S. 637 (1971); *Hines v. Davidowitz*, 312 U.S. 52 (1941). See generally G. GUNTHER AND N. DOWLING, *CONSTITUTIONAL LAW* 670 (8th ed. 1970).

71. See *Housing and Urban Development Act*, 12 U.S.C. § 1720 (1969); *Housing and Urban Development Act*, 42 U.S.C. § 1441 (1968); *The Fair Housing Amendments to the Civil Rights Act*, 42 U.S.C. § 3532 *et seq.* (1968); *Demonstration Cities and Metropolitan Development Act*, 42 U.S.C. § 1445 (1966); *Housing Act of 1964*, 12 U.S.C. § 1703 *et seq.* (1964).

lation interferes with national policy objectives. One or the other will prevail. The case against local control is that land-use regulation is used to discriminate against low-income groups and minorities by effectuating resegregation and isolation and prohibiting construction of federally-assisted housing in the suburban communities. The case for pre-emption is that regional land use and control will optimize the utilization of land resources and insure equal protection and due process in the placement of low-income housing in all communities.

A solution has suggested itself in the form of present and pending state legislation establishing state-wide and regional planning boards. The purpose of this legislation is to promote regional land control and use. The premise is that comprehensive plans encompassing large geographical areas will facilitate better use of land resources.⁷² State and regional planning boards will have supervisory and reviewing power over local decisions to promote state-wide interests, thereby encouraging and enhancing intergovernmental cooperation. The by-product of this type of legislation is that local communities lose control over the uses to which their land is subject. Regulations standing in the way of regional population expansion or excluding needed types of construction will be invalidated. Low-income families seeking homes will not have to deal exclusively with local preferences on land use.

The fundamental concept behind these regional land-use laws is to require every community to be aware of and provide for the needs of all people regardless of race or income level.⁷³ If each community knew that all others must provide low-income housing, attitudes and behavior might change. Only through national legislation does this seem possible.⁷⁴

72. See Becker, *Municipal Boundaries and Zoning: Controlling Regional Land Development*, 1966 WASH. U.L.Q. 1; Cunningham, *Zoning Law in Michigan and New Jersey: A Comparative Study*, 63 MICH. L. REV. 1171 (1965); Boston Study Team, Bureau of Public Affairs, Boston College, *Metropolitan Boston—A Fresh Approach*, 3 PORTIA L.J. 131 (1968); Comment, *Comprehensive Plan as Limitation on Board of Adjustment*, 24 OKLA. L. REV. 499 (1971); Comment, *Regional Planning and Local Autonomy in Washington Zoning Law*, 45 WASH. L. REV. 593 (1970).

73. See Lordham, *Some Questions and No Answers About Urban Regionalism*, 1971 UTAH L. REV. 11; Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957); Comment, *Are Zoning Boards Required by the Constitution to Consider Regional Needs*, 3 CONN. L. REV. 244 (1971); Note, *Regional Development and the Courts*, 16 SYRACUSE L. REV. 600 (1965).

74. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 263 (1968). The report concluded: "The key to breaking down housing discrimination is universal and uniform coverage and such coverage is obtainable only through Federal legislation."

STATE LEGISLATION

State and federal legislation can benefit housing programs through land write-downs, tax abatement, technical assistance, money loans, grants and financing.⁷⁵ Many states have established state agencies with housing responsibilities but so far most have been ineffectual. A few states have begun to develop laws whereby local zoning ordinances forbidding low-income housing can be reviewed by a state agency.⁷⁶

In New York, the Urban Development Corporation⁷⁷ can reverse local zoning decisions which reject a site that is appropriate for low-income housing. New Jersey gives an injunctive remedy to any "other interested party"⁷⁸ when land is used in violation of the state code. "Other interested party"⁷⁹ is defined to include people in and out of the community who are affected by the use or whose constitutional rights are denied. Hawaii has established a Land Use Commission.⁸⁰ Any property owner may petition for a change of use of the land, if adaptable for the proposed use and trends in development and conditions have changed so as to make the present zoning unreasonable.

Every state should require municipalities to draft plans to include the possibility of low-income housing and develop realistic procedures whereby direct administrative appeals can be made. Massachusetts has added to its state laws a low and moderate income housing section.⁸¹ Local zoning boards must now consider the impact their decisions have

75. NATIONAL INSTITUTE FOR EDUCATION IN LAW AND POVERTY, I HANDBOOK ON HOUSING LAW, *Guide to Federal Housing Redevelopment and Planning Programs* (1970). Subsequent editions of the Handbook will deal directly with restrictive zoning and other *de facto* segregation techniques.

76. See *Symposium: Exclusionary Zoning*, 22 SYRACUSE L. REV. 465 (1971); Comment, *Snob Zoning: Developments in Massachusetts and New Jersey*, 7 HARV. J. LEGIS. 246 (1970); Comment, *New Jersey Judiciary's Response to Exclusionary Zoning*, 25 RUTGERS L. REV. 172 (1970).

77. N.Y. UNCONSOL. LAW §§ 6251-85 (McKinney, 1968); N.Y. GEN. MUN. LAW § 239-m (McKinney Supp. 1970).

78. N.J. STAT. ANN. §§ 40:55-30 to 51 (Supp. 1971). Under this statute, the New Jersey Superior Court recently held, in *Oakwood at Madison, Inc. v. Township of Madison*, 117 N.J. Super. 11, 283 A.2d 353 (1971), that when a township ordinance aims at excluding low-income families through restrictions on minimum floors and minimum lot sizes, it is invalid under the New Jersey Zoning Act. The court felt that general welfare means *regional* general welfare. See Note, *New Jersey Judiciary's Response to Exclusionary Zoning*, 25 RUTGERS L. REV. 172 (1970).

79. N.J. REFORM CODE ANN. §§ 55-47 (1970).

80. HAWAII REV. STAT. §§ 205-1 to 205-15 (Supp. 1971), *as amended*, §§ 205-1 to 205-37 (Supp. 1971).

81. MASS. GEN. LAWS ANN. ch. 40B §§ 20-23 (Supp. 1970).

on regional and state needs for low-income housing. Local requirements and regulations will be considered by the state "consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing."⁸² Further, such requirements and regulations must be applied equally to both subsidized and unsubsidized housing. The community is required to permit a specific percent of public housing units on a specific percentage of the total land. The state law thus insures that local officials include low-income housing in the area unless there is an adequate supply and any refusal can be appealed. There is even the option of submitting an application for construction of low-income housing directly to the appeals board in lieu of applications to the local zoning boards.⁸³ This type of legislation allows the state to supervise the activities of local zoning boards, to facilitate low-income housing construction starts, and from a regional viewpoint, to control and regulate population expansion. Local boards retain most of their discretion, but lose their ability to be overly protective. The Massachusetts, New York, New Jersey, and Hawaii state legislatures have realized that "the overall solution to these [zoning] problems lies with greater regional planning."⁸⁴

The legislature of Illinois has introduced legislation to study, amend, or replace present land-use regulations in order to end inadequate or inappropriate uses of land resources. A Planning and Conservation Laws Study Commission⁸⁵ is sought to examine existing problems, statutes, and judicial decisions of Illinois concerning "the planning, use and conservation of the land resources of the State and its subdivisions."⁸⁶ The study will use voluntarily submitted data to investigate specific environmental, social and governmental activities that may need technical assistance and compile a file on persons with expertise in the area.

The Illinois Department of Local Government Affairs is directed in another bill to establish a Division of Land Use Regulation,⁸⁷ and a State Land Use Commission. The Division of Land Use Regulation is given standing to review and make written comments to governing bodies upon any original ordinance or comprehensive amendatory ordinance. The Division shall be given notice of any public housing concerning ordinances

82. MASS. GEN. LAWS ANN. ch. 40B § 20 (Supp. 1970).

83. MASS. GEN. LAWS ANN. ch. 40B § 21 (Supp. 1970).

84. *Douglas Report*, H.R. DOC. NO. 91-34, 91st Cong., 1st Sess. 211 (1968). See NATIONAL COMMISSION ON URBAN PROBLEMS RESEARCH REPORT, PROBLEMS OF ZONING AND LAND-USE REGULATION (1968).

85. H.B. 1807, 77th G.A. (1971).

86. H.B. 1807, 77th G.A. (1971) at § 2.

87. H.B. 1808, 77th G.A. (1971).

affecting, among other things, governmentally supported or insured housing. This Division, through its participation at local hearings and its comprehensive plans and suggestions, will act as a central coordinate point for state and local action.⁸⁸ The desire of the state is apparent: more participation by the state in local decision on land use. The optimal use of the land is no longer a local issue.

There is a proposed addition to the Illinois Municipal Code.⁸⁹ Upon the finding by a circuit court that a zoning ordinance prevents or isolates low-income housing, the municipality will be directed to permit construction of low and moderate income housing. The section in its entirety is as follows:

No municipality may exercise the powers granted in this Division 13 to prevent the construction of single family or multifamily low-income housing in that municipality or to cause such housing to be isolated from other residential areas. If the circuit court finds that the exercise of those powers by any municipality *operates to produce such an effect*, the court shall direct the corporate authorities of that municipality to permit the construction, in any residential zone, of any housing which is designed to meet the requirements of the Federal Housing Administration's "Minimum Property Standards for Multi-family Housing" or "Minimum Property Standards for One and Two Living Units", whichever is appropriate, including the revisions thereto in effect on January 1, 1971.⁹⁰

Obviously, the section is designed to deal with the effect of a zoning ordinance, not merely the motives or intent. The section also incorporates, by reference, federal standards for low-income housing. True freedom of choice in housing will be available to low-income families only when there is an adequate supply of low-income housing in areas outside the racially concentrated central cities.

It is not within the scope of this comment to draft a model state land-use code.⁹¹ However, certain types of provisions which should be included in any state zoning code will be mentioned. As immediate preemption by the state of local regulations affecting public housing may not be viewed as a viable solution, these provisions can be initiated as a compromise between local and state control. The provisions discussed are found in the Illinois Land Resources Zoning Code.⁹²

88. See H.B. 1806, 77th G.A. (1971) in which an Intergovernmental Cooperation Act is proposed to provide for joint exercise of powers by state agencies and local governments to coordinate geographic, economic and population factors.

89. ILL. REV. STAT. ch. 24 (1971).

90. H.B. 1193, 77th G.A. (1971) (emphasis added). See H.B. 1191 and H.B. 1192 for similar additions to township and county zoning acts.

91. See Comment, *Model Land Use and Development Code*, 1971 URBAN L. ANN. 101; Note, 36 MO. L. REV. 1 (1971).

92. H.B. 1805, 77th G.A. (1971).

The most interesting aspect of the Code is its shift in emphasis. In the proposed declaration of policy and purpose, the Code recognizes land as the fundamental natural resource, the use and development of which shall be controlled to promote existing and future public interests. These interests are the social, economic and environmental needs of its subdivisions. Gone is the language protecting the public health, safety, morals and general welfare. In the past this phraseology was used to justify too broad a range of restrictions. The new language promotes more specific goals at the state level. A comprehensive zoning plan is mandatory so that municipal ordinances or amendments are consistent with the goals, objectives, proposals and standards contained in the Code.

To further implement the desire for the optimal use of land, the Code requires a mandatory review by local units of the classification of uses and districting of all the land within their jurisdiction. Presently neither comprehensive zoning plans nor periodic review are required. Without such requirements land use planning would be meaningless as planning would be shortsighted and once a plan was initiated it would continue indefinitely whether beneficial to the public or not.

The provision allowing for application for amendments is not broad enough to insure standing by nonresident minority groups or low-income families. Applications for zoning amendments can only be made by a public official or persons residing or owning property within the jurisdiction. The provision should, however, provide standing for persons who live outside the area whose rights are affected by the local zoning ordinance because they are employed within the jurisdiction. Standing is extended to any person not a party to the application if he can show special or unique damages to himself or his property. The type and extent of damages required is not set out. This burden of proof, nevertheless, would be onerous on a private individual or family denied a decent place to live or work.

The standards for planned unit developments require that zoning ordinances provide reasonable criteria to evaluate the proposal. The criteria can neither unreasonably restrict the owner's ability to relate the plan to the site nor ignore the particular demand for housing existing at the time of development. The owner would not be faced with local restrictive construction standards preventing low-income housing. National construction standards would govern all building. If there were a marked shortage in a specific type of housing, this need would be recognized.

Normally, an action taken by a governmental unit is presumed valid and will remain in effect until proven otherwise. The Code carves out

an expressed exception to this rule. The action shall be presumed valid except

when such action results in a denial of housing opportunity to persons *employed* within the jurisdiction and when there is a demonstrable need for such housing within the jurisdiction such presumption shall not arise.⁹³

The focus is on the results of local action. It should also be noted that this section is not limited to persons residing or owning property in the area. The purpose of the section is to provide housing for all persons who work in the area regardless of where they presently live.

Among the standards required for judicial review, the court must consider, among others, the following factors before rendering a decision: (1) The need in the area and surrounding region for a particular land use, (2) the public benefits compared to the limitations imposed on the owner by the ordinance, and (3) the effect existing and proposed ordinances will have on the patterns of racial, ethnic, or economic segregation of residences in the area. Of course, the courts have yet to determine what are the low-income housing needs, what is the extent that public benefits outweigh private ones, or what is the precise effect ordinances have on racial and economic segregation. The Code, however, requires that the court be cognizant of them.

This is hardly an exhaustive list of possible provisions that could enhance the opportunity for public housing to be placed in areas where it is most needed. It is a good legislative start in providing low-income housing for minorities and families with low incomes. It may be disheartening for citizens to watch the state take over the control of land since local control and home rule are basic concepts in the American way of life.⁹⁴ However, when individual communities fail to respond to the needs of the general public, solutions will be forthcoming elsewhere. In this case, states are beginning to adopt regional land-use laws.⁹⁵ What may be even more disheartening to local governments is that the federal government is considering similar legislation.

FEDERAL LEGISLATION

The Federal government is quickly rationalizing the implementation of land-use controls. In the name of ecology, this legislation will usurp the

93. H.B. 1807, §§ 10-102, 77th G.A. (1971).

94. Illinois' new state constitution includes a new home rule article. See ILL. CONST. art. 7.

95. See text *supra* note 77, *et seq.*

power heretofore vested in the local municipalities. Local control has failed to deal with land-use problems of more than local significance.

The proposed National Land Policy, Planning, and Management Act of 1972⁹⁶ finds an urgent need for federal public land-use planning and land-use planning for land in non-federal ownership. The planning is to occur at the federal level because the present state and local institutional arrangements for planning land use of more than local impact are often inadequate. While there is a national interest in encouraging states to control non-federal lands, the states will be assisted, in cooperation with local governments, in dealing with land-use decisions of more than local significance.

The federal government will make grants to states that have adopted a comprehensive land-use plan. This plan must follow the national policy and insure that local regulations do not restrict or exclude regional development. The overriding purpose of this act is to establish long-term public land policies to give direction to the federal land management agencies and to assist the states in land-use planning. The federal government is aware of the factors which cause fragmented land-use schemes. Its efforts in the future will be directed toward coordinating land regulation to achieve national priorities.

In another proposed piece of land-use regulation, the Land Use Policy and Planning Assistance Act of 1972,⁹⁷ Congress spells out the problems and suggests solutions in regulating land resources. The Act declares that it is the national policy to favor patterns of land-use planning, management and development which are in accord with social values and to encourage the balanced use of the Nation's land resources. This policy includes financial assistance to states to develop land-use programs for non-federal land and increase cooperation in the administration and management of federal lands.

CONCLUSION

While state and federal legislation has not yet specifically pre-empted local power to exclude low-income housing, its trend is in that direction.

96. H.R. 7211, 92nd Cong. 2d Sess. (1972). See Marcus, *Exclusionary Zoning: The Need for a Regional Planning Context*, 16 N.Y.L.F. 732 (1970); Walsh, *Are Local Zoning Bodies Required by the Constitution to Consider Regional Needs?* 3 CONN. L. REV. 244 (1971); Weinberg, *Regional Land-Use Control: Prerequisite for Rational Planning*, 46 N.Y.U. L. REV. 786 (1971); Note, *Exclusionary Zoning from a Regional Perspective*, 1972 URBAN L. ANN. 239; Note, *State Police Power—Zoning—Validity of Local Ordinance Depends on Considerations of Regional, Not Merely Local, General Welfare*, 25 VAND. L. REV. 466 (1972).

97. S. 632, 92nd Cong., 2d Sess. (1972).

Supervision and review by state and federal agencies are the intermediate steps to out-right control. While many land-use regulations are still proprietary in that they concern purely local matters, the placement and construction of low-income housing has regional and national impact. Zoning out low-income housing is like zoning out schools, churches, hospitals, medical facilities and state institutions.⁹⁸ Exclusionary land-use regulations will not stand in the way of a use affected with a public interest.⁹⁹

The course for communities to follow is to terminate the use of their powers to zone and control land-use to hinder the opportunities and constitutional rights of low-income families seeking housing in the area. It is better from a home rule standpoint to permit low-income housing at a reasonable rate, thereby retaining control over land-use and, at the same time, furthering state and national fair housing policies. Otherwise, the stage is set for state and federal control of land-use in placing and constructing low-income housing.

William Groebe

98. When local regulations affect regional needs and interests, they will be invalidated. There is clear precedent to give certain types of uses special consideration. Low-income housing may soon be among those preferred uses. *See Sisters of Bon Secours Hospital v. City of Grosse Pointe*, 8 Mich. App. 342, 154 N.W.2d 644 (1967) (hospital); *Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus*, 47 N.J. 211, 220 A.2d 97 (1966) (school); *Diocese of Rochester v. Planning Bd. of Town of Blighton*, 1 N.Y.2d 508, 136 N.E.2d 827 (1956) (churches); *Rogers v. Association for the Help of Retarded Children*, 308 N.Y. 126, 123 N.E.2d 806 (1954) (semi-residential public service). *See also*, *Thanet Corp. v. Board of Adjustment*, 104 N.J. Super. 180, 249 A.2d 31 (1969); *Ouffcon Concrete Products v. Borough of Cresskill*, 1 N.J. 509, 64 A.2d 347 (1949).

99. *See West v. Housing Authority of Atlanta*, 211 Ga. 133, 84 S.E.2d 30 (1954); *City of Bloomfield v. Davis County Community School Dist.*, 254 Iowa 900, 119 N.W.2d 909 (1963); *Village on the Hill, Inc. v. Massachusetts Turnpike Authority*, 348 Mass. 107, 202 N.E.2d 602 (1964); *Nehrbas v. Inc. Village of Lloyd Harbor*, 2 N.Y.2d 190, 140 N.E.2d 241 (1957). *See also* 8 McQUILLAN, *MUNICIPAL CORPORATIONS* § 2515 (3rd ed. rev. 1965); Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. CIV. RIGHTS REV. 307 (1970); Note, 31 GEO. WASH. L. REV. 525 (1962).